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The Toxic Workplace of the Child Farmworker

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THE TOXIC WORKPLACE OF THE CHILD FARMWORKER

INTRODUCTION

With the passage of the Occupational Safety and Health Act in 1970, Congress sought to assure a safe occupational environment for every American worker.[1] To date, this protection has been denied to children employed as agricultural laborers. The child farmworker faces the risk now understood to be part of most all agricultural employment; the risk of exposure to agricultural toxins which are later found to be hazardous to human life.[2] Moreover, the child farmworker faces additional hazards of unknown proportions because the federal government has thus far refused to recognize the multitude of special dangers which agricultural toxins represent to physically immature human beings.[3] Among others, these dangers include increased susceptibility to asthma,[4] heightened sensitivity to agents that interfere with calcium metabolism,[5]

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1. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. § 651-78 (1976)).

2. Commonly known pesticides and herbicides with this kind of case history include DDT, Aldicarb (also known as Temik), and 2,4,5, trichlororophenoxyacetic acid (popularly referred to as "Agent Orange"). One of the more recent examples is toxaphene, a pesticide once heavily used in the production of cotton and soybeans and now restricted to limited usage because of its identification as "a possible cancer-causing substance." N.Y. Times, Oct. 17, 1982, at 25, col. 1.

The case history of these substances illustrates that toxicology has not yet been reduced to an exact science. Consider the following:

> Toxicology, like medicine, is regrettably still largely a matter of subjective opinion, especially in the interpretation of experimental animal data. The scientific basis of toxicology will not be firmly established until our knowledge of the molecular mechanisms of carcinogenesis, teratology, etc., is as advanced as our understanding of acute lethal injury. Consequently, expert opinions will change as basic knowledge increases and leads to more precise and exacting methods of analysis . . . .

Parke, *Preface* to G. VETTORAZI, INTERNATIONAL REGULATORY ASPECTS FOR PESTICIDE CHEMICALS (1979). In the case of the fungicide Captan, for example, Vettorazi has concluded: "Long-term studies in the rat and mouse have failed to demonstrate any carcinogenic potential." *Id.* at 17. One year earlier, a study submitted to the Environmental Protection Agency (EPA) had found Captan "to be carcinogenic in mice." National Ass'n of Farmworkers Org. v. Marshall, 628 F.2d 604, 610 n.16 (D.C. Cir. 1980).

3. *See infra* text accompanying notes 16-109.

4. *See National Ass'n of Farmworkers Org.*, 628 F.2d at 614 n.42.

5. *Id.* Other factors contributing to the greater vulnerability of children to pesticide

and greater vulnerability to reproductive disorders because of the developing or immature status of the reproductive system.[6]

The Secretary of Labor, the Occupational Safety and Health Administration (OSHA), and the Environmental Protection Agency (EPA) are all arguably vested with some degree of responsibility for insuring the occupational health of the child farm laborer,[7] but the response of these federal actors to the dangers a child faces when entering the farm fields to work has been less than impressive. For the most part, the Secretary of Labor has confined himself to limiting children's exposure to substances immediately harmful upon contact;[8] no protection has been provided against toxins which through repeated exposure may result in consequences equally severe.[9] The passage of the Occupational Safety and Health Act was in part prompted by concern for farmworker safety,[10] but judicial interpretation of that legislation has held that OSHA is without authority to protect farmworkers against agricultural toxins.[11] The courts instead have held that the EPA, under its authority to register all pesticides and herbicides used in this country,[12] is required to consider the effects of these materials on human life prior to granting a registration request.[13] The EPA has admitted, however, that it has no data detailing the effects of these substances on children.[14]

The plight of soldiers exposed to "Agent Orange" in the fields of Vietnam stands as testimony to the hazards of imprudent exposure to pesticides, herbicides and similar toxins.[15] If a similar tragedy is to be averted in the nation's farm fields, a concerted effort

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dangers include heightened sensitivity to agents that interfere with the body's use of protein and greater absorption of toxins in the developing tissues and organs. *Id.*

6. *Id.* at 607 n.6.

7. *See infra* text accompanying notes 16-109.

8. *See* 29 C.F.R. 570.71(a)(9)(1982).

9. *See infra* text accompanying notes 27-30.

10. *See* Organized Migrants in Community Action, Inc. v. Brennan, 520 F.2d 1161, 1167 (D.C. Cir. 1975).

11. *Id.* at 1169.

12. Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, § 2, 86 Stat. 797 (codified as amended at 7 U.S.C. § 136a(a) (1976)).

13. *See* 7 U.S.C. § 136a(c)(5) (1982).

14. *See National Ass'n of Farmworkers Org.*, 628 F.2d at 614 n.43.

15. *See generally* Meyers, *Soldier of Orange: The Administrative, Diplomatic, Legislative, and Litigatory Impact of Herbicide Agent Orange in South Vietnam*, 8 B.C. ENVTL. AFF. L. REV. 159, 180-97 (1979).

must be undertaken to eliminate the continued exposure of child farmworkers to toxins. It will be the position of this Comment that even if existing legislation were adequately enforced, children within the agricultural workforce would not receive sufficient protection against the toxins of their workplace. Instead, the optimum solution presently lies in the creation of an independent agency, dedicated to ensuring protection against and compensation for toxin related illness.

I. Analysis of the Law and Its Enforcement

There are three pieces of federal legislation which theoretically direct agencies in the federal government to take responsibility for the safety of children in the agricultural workforce; the Fair Labor Standards Act,[16] which outlaws "oppressive child labor"; the Occupational Safety and Health Act,[17] designed to improve the safety of the American work environment; and the Federal Environmental Pesticide Control Act,[18] passed to tighten federal regulations governing the use of pesticides and associated poisons. These statutes are directives to the Secretary of Labor, the Occupational Safety and Health Administration, and the Environmental Protection Agency, respectively. An analysis of the dangers the child farmworker faces must begin with an examination of these federal actors, the extent to which they have responded to the toxin problem, and the limitations of the statutes under which they operate.

A. *Fair Labor Standards Act*

Passage of the 1938 Fair Labor Standards Act (FLSA) was an express congressional condemnation of oppressive child labor practices. The heart of the Act prohibits the transportation in interstate commerce of goods produced under conditions which Congress had earlier defined as constituting oppressive child labor.[19] With the exception of a parent employing his or her own child,[20] Congress believed the employment of any child under the age of

16. Fair Labor Standards Act of 1938, ch. 676, § 12, 52 Stat. 1067 (codified as amended at 29 U.S.C. § 201 (1976)).

17. 29 U.S.C. § 651(b)(1) (1976)).

18. Federal Environmental Pesticide Control Act of 1947, Pub. L. No. 92-516, § 2, 86 Stat. 975 (codified as amended at 7 U.S.C. §136a (1982)).

19. 29 U.S.C. § 212(c) (1976).

20. *Id.* §§ 203(l), 213(c)(2).

sixteen,[21] or the employment of a child between the ages of sixteen and eighteen in an occupation the Secretary of Labor finds to be "particularly hazardous,"[22] should be considered "oppressive child labor."[23] Congress also provided that in the event the Secretary finds that employment of children between the ages of fourteen and sixteen will not interfere with their schooling or well-being, he can, by regulation, permit such employment.[24]

The language of the FLSA places an affirmative burden on the Secretary of Labor to find that no threats or hazards to health exist before children under the age of sixteen are allowed to enter the workforce in any industry or occupation. The Act provides, however, that the agriculture industry is exempt from this scheme,[25] and so, as to agriculture, this duty is removed. The FLSA specifically states that its prohibition against transporting goods produced by child workers in interstate commerce is not to apply to "any employee employed in agriculture," unless the Secretary of Labor has made a finding that a specific agricultural occupation is "particularly hazardous" for children under age sixteen.[26] Accordingly, unlike other occupations which must prove the *absence* of a hazard before fourteen and fifteen year olds can join the workforce, in agriculture, the Secretary must *find* a hazard before he or she can disallow the employment of children under sixteen.

Regulations have been promulgated by the Department of Labor which list certain occupations in agriculture considered to be sufficiently dangerous to constitute oppressive child labor for children under the age of sixteen.[27] Most of the occupations listed concern the operation of power machinery,[28] but the Department has also indicated that it considers the handling or application of any agricultural chemicals classified by the EPA as being in Toxicity Categories I or II to be of sufficient hazard to justify regulations barring children from such work.[29] Toxicity Categories I and II for

21. *Id.* § 203(l)(1).
22. *Id.* § 203(l)(2). The determination as to whether the employment is "particularly hazardous" is made by the Secretary of Labor. *Id.*
23. *Id.* § 203(l).
24. *Id.*
25. *Id.* § 213(c).
26. *Id.*§ 213(c)(2).
27. 29 C.F.R. § 570.70 (1982).
28. *Id.* § 570.71(a) (1)-(8).
29. *Id.* § 570.71(a)(9).

the most part consist of those materials which are fatal or seriously harmful to the victim of accidental exposure.[30] Those chemicals which present less of a threat upon first contact, but may pose substantial or equal risk through repeated exposure, have been ignored. Keeping all of this in mind, it bears looking at the legislative history and judicial interpretations of the FLSA to determine if the Department's failure to act in the area of child farmworker exposure to toxins comports with that law.

1. *Legislative history.* The legislative history of the 1938 Act is revealing both for what it says and for what it fails to say. The Fair Labor Standards Act was first considered by Congress in 1937 in almost identical legislation introduced in the House and Senate.[31] Both pieces of legislation defined the term "employee" in

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30. The EPA is required by the Federal Environmental Pesticide Control Act, 7 U.S.C. § 136 (1982), to register and control the use and distribution of all pesticides. In the course of this process, the EPA has developed the table below to classify substances by toxicity.

Hazard indicators	Toxicity categories I	II	III	IV
Oral LD_{50}	Up to and including 50 mg/kg.	From 50 thru 500 mg/kg	From 500 thru 5000 mg/kg.	Greater than 5000 mg/kg.
Inhalation LC_{50}	Up to and including .2 mg/liter.	From .2 thru 2 mg/liter	From 2. thru 20 mg/liter	Greater than 20 mg/liter.
Darmal LD_{50}	Up to and including 200 mg/kg.	From 200 thru 2000	From 2,000 thru 20,000	Greater than 20,000.
Eye effects	Corrosive; corneal opacity not reversible within 7 days.	Corneal opacity reversible within 7 days; irritation persisting for 7 days.	No corneal opacity; irritation reversible within 7 days.	No irritation.
Skin effects	Corrosive	Severe irritation at 72 hours.	Moderate irritation at 72 hours.	Mild or slight irritation at 72 hours.

40 C.F.R. § 162.10 (1982). The warning statements which the Agency requires be placed on pesticides, again according to toxicity category, are more intelligible to the non-scientist:

Toxicity category	Precautionary statements by toxicity category: Oral, inhalation, or dermal toxicity	Skin and eye local effects
I	Fatal (poisonous) if swallowed [inhaled or absorbed through skin]. Do not breathe vapor [dust or spray mist]. Do not get in eyes, on skin, or on clothing [Front panel statement of practical treatment required.].	Corrosive, causes eye and skin damage [or skin irritation]. Do not get in eyes, on skin, or on clothing. Wear goggles or face shield and rubber gloves when handling. Harmful or fatal if swallowed. [Appropriate first aid statement required.]
II	May be fatal if swallowed [inhaled or absorbed through the skin]. Do not breathe vapors [dust or spray mist]. Do not get in eyes, on skin, or on clothing. [Appropriate first aid statements required.].	Causes eye [and skin] irritation. Do not get in eyes, on skin, or on clothing. Harmful if swallowed. [Appropriate first aid statement required.].
III	Harmful if swallowed [inhaled or absorbed through the skin]. Avoid breathing vapors [dust or spray mist]. Avoid contact with skin [eyes or clothing]. [Appropriate first aid statement required.].	Avoid contact with skin, eyes or clothing. In case of contact immediately flush eyes or skin with plenty of water. Get medical attention if irritation persists.
IV	[No precautionary statements required.]	[No precautionary statements required.]

Id.

31. Wason, *Legislative History of the Exclusion of Agricultured Employees from the National Labor Relations Act, 1935, and the Fair Labor Standards Act of 1938*, in Congressional Research Service MAJOR STUDIES OF LEGISLATIVE REFERENCES 1916-1974, at 8 (1975).

such a way as to specifically exclude agricultural workers.[32] The rationale for this exclusion has been explained as follows:

> It is clear that there was never any serious consideration given to dropping the agricultural exemption which appeared in the original wage and hour bills considered by the Congress in 1937. The efforts [undertaken in the course of committee and floor debate] were entirely along the line of strengthening and broadening the application of the exemption, and adding exemptions in the area of handling, transporting, packing, and processing of agricultural commodities. . . .[33]

It appears as though the scope and form of the FLSA were strongly influenced by the National Labor Relations Act (NLRA),[34] passed three years earlier. The original Senate version of the NLRA did *not* exclude agricultural laborers.[35] When the question of the bill's coverage was raised, it was initially proposed to exempt those businesses with a limited number of employees,[36] but there is evidence that the Senate Education and Labor Committee contemplated an agricultural exemption.[37] The Washington State representative of the National Grange[38] testified in favor of such an agricultural exception: "[T]he workability of the Wagner Bill [the NLRA] would be greatly improved if it were amended so as to exempt farm labor."[39] There is little else in the NLRA's Senate history to indicate any specific intention to exclude farmworkers from the scope of the Act. Nonetheless, the bill approved by the Senate carried an agricultural exemption.[40]

Every version of the NLRA proposed in the House contained an agricultural exception.[41] House debate indicates an intent to pass protective legislation for farmworkers eventually, but also evidences an awareness that immediate protection was precluded by political considerations. Consider this statement made by Congressman William Connery:

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32. *Id.*
33. *Id.* at 10.
34. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151 *et seq.* (1976)).
35. Wason, *supra* note 31, at 1.
36. *Id.* at 2.
37. *Id.* at 3.
38. The National Grange is an organization representing the interests of farmers.
39. Wason, *supra* note 31, at 3.
40. *Id.* at 5.
41. *Id.*

> [C]ertainly I am in favor of giving the agricultural workers every protection, but just now I believe in biting off one mouthful at a time. If we can get this bill through and get it working properly, there will be opportunity later, and I hope soon, to take care of the agricultural workers.[42]

It is clear that the NLRA provided precedent for excluding farmworkers from the scope of national labor legislation when Congress passed the FLSA in 1938.[43] As to the specific exclusion of agricultural laborers from the FLSA's minimum wage, maximum hour, and child labor provisions, it appears to be a case of political considerations exacting their price.[44] The specific exemptions the farm industry won were nonetheless considered insufficient by representatives of rural constituencies; they feared the legislation would apply to industries related to farming, for example food processing, and thereby reduce farm profits.[45] It was also feared that the overall impact of the legislation would be to drive up the prices of those goods farmers purchased.[46]

In short, the legislative histories of the NLRA and the FLSA contain scant reference to farmworker safety. In both instances, the operative concerns of the Congress when dealing with workers employed in the agricultural labor force were economic and political.[47] There is evidence in the legislative history of the NLRA that Congress intended to address agricultural safety issues at a later date,[48] and the FLSA itself explicitly authorizes the Secretary of Labor to prohibit the employment of those under sixteen when such work poses particular hazard.[49] The conclusion to be drawn

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42. *Id.* at 7.

43. There are obvious similarities between the definition of employee—the exclusion of the agricultural laborer—in the first versions of the FLSA introduced in the House and Senate and the corresponding definition and exception in the Wagner Act. Wason, *supra* note 31, at 8.

44. *Id.* at 12. Wason writes that congressional supporters of the NLRA believed the agriculture exemption was needed to acquire the votes necessary for passage of the bill. *Id.*

45. *Id.*

46. *Id.*

47. *See id.* at 7, 12.

48. *Id.* at 3.

49. 29 U.S.C. § 213(c)(2) (1976). It should be noted that the FLSA was enacted over forty years ago; the dangers of pesticide use were not widely recognized at that time. Federal poison legislation was nonexistent until some nine years later when Congress passed the Federal Insecticide, Fungicide, and Rodenticide Act of 1947, ch. 125, 61 Stat. 163 (codified as amended at 7 U.S.C. § 135 (1982)). This legislation was directed mostly towards insuring adequate labelling. *See* Note, *EPA Pesticide Regulation*, 5 ECOLOGY L.Q. 233, 234 (1976). It is currently estimated that one *billion* pounds of these poisons are applied annually.

from this analysis is that no legitimate explanation can be found in either the FLSA or the statute which influenced it, the NLRA, to justify the Secretary of Labor's failure to adopt a more active policy in addressing the dangers child farmworkers face.

2. *Case law.* Judicial decisions interpreting the FLSA have held the Act's exemptions are to be "narrowly construed,"[50] and that its provisions are to be interpreted to benefit the children it is designed to protect.[51] The United States Supreme Court ruled that exceptions to the FLSA were to be given a narrow construction in *Phillips Co. v. Walling*,[52] a 1944 case where it was asked to decide the scope of the "retail establishment" exemption[53] of the FLSA. The Court stated:

> The Fair Labor Standards Act was designed "to extend the frontiers of social progress. . . ." Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and frustrate the announced will of the people.[54]

In *Lenroot v. Kemp*,[55] a Fifth Circuit Court of Appeals case reviewing the refusal of a lower court to issue an injunction to block further violations of the FLSA, the majority noted that Congress legislated the child labor provisions of the Act "in the interest and for the welfare of the children of this country."[56]

The holdings of these and other decisions interpreting the FLSA[57] must be considered in light of congressional concern over pesticide dangers as was expressed by the 1972 passage of the Fed-

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McEwen, *Pesticide Residues and Agricultural Workers: An Overview*, in PESTICIDE MANAGEMENT AND INSECTICIDE RESISTANCE 37 (1977).

50. Phillips Co. v. Walling, 324 U.S. 489, 493 (1945).

51. Lenroot v. Kemp, 153 F.2d 153, 156 (5th Cir. 1946).

52. 324 U.S. 489 (1945).

53. 29 U.S.C. § 213(a)(2) (1976).

54. Phillips Co. v. Walling, 324 U.S. at 493. The court's construction of the FLSA in *Phillips* was not unique. It was echoed in *Powell v. U.S. Cartridge Co.*, where the court wrote: "Where exceptions were made, they were narrow and specific." 339 US 497, 517 (1949). *See also* Wirtz v. Keystone Readers Serv., Inc., 418 F.2d 249, 259 (5th Cir. 1969) ("narrow contruction . . . must be given to the retail extablishment exemption in light of remedial purposes of the Act").

55. 153 F.2d 153 (5th Cir. 1946).

56. *Id.* at 156.

57. *See supra* note 54.

eral Environmental Pesticide Control Act.[58] Further, it bears repeating that the language of the FLSA itself expressly provides that if agricultural work is determined to be "particularly hazardous," children under sixteen are not to be so employed.[59] To confine the interpretation of "particular hazard" to contact with those chemicals fatal or seriously harmful upon accidental exposure, and to ignore those chemicals which through repeated exposure may have equally devastating results,[60] repudiates the FLSA as courts have interpreted it. The Secretary's interpretation of the statute clearly conflicts with the legislative history and judicial interpretations of the FLSA; both indicate that a more active policy toward the employment of children under sixteen[61] in the often poisonous environment of agriculture should be adopted.[62]

B. *Occupational Safety and Health Act*

Congress passed the Occupational Safety and Health Act in 1970.[63] The stated purpose of this legislation is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . ."[64] The legislative history of the

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58. 7 U.S.C. § 136a (1982).

59. 29 U.S.C. § 213(c)(2) (1976).

60. *See supra* notes 27-30 and accompanying text.

61. Oppressive child labor is defined by the FLSA to include the work of anyone between the ages of sixteen and eighteen "in any occupation which the Secretary shall find and declare to be particularly hazardous for the employment of children between such ages . . . ." 29 U.S.C. § 203(l) (1976). The term "particular hazard" is identical to that found in § 213(c)(2), where the Secretary is authorized to narrow the exemption for those under sixteen. *Id.* § 213(c).

The EPA's pesticide standards represent safe levels for adults, 29 C.F.R. § 575.5(d) (1982), but workers under the age of eighteen are not adults. Therefore, a narrow construction of the exemption, a *Phillips* argument, similar to that made in the text of this Comment for those under sixteen, could conceivably be stretched to apply to all those under the age of eighteen.

62. The Supreme Court's holding in Heydenfeldt v. Daney Gold Mineral Co., 93 U.S. 634 (1876), provides an alternative rationale to reach the same conclusion. On the question of statutory interpretation the Court said: "If a literal interpretation of any part of [a statute] would operate unjustly . . . and be contrary to the evident meaning of the Act taken as a whole, it will be rejected." *Id.* at 638. Literally, Congress provided for an agricultural exemption, but it also provided the child labor clauses "in the interest and for the welfare of the children of the country." Lenroot v. Kemp, 153 F.2d at 156. In light of the hazards presented by agricultural poisons, the *Heydenfeldt* rationale supports the adoption by the Department of Labor of a far more active position.

63. 29 U.S.C. § 651 (1976).

64. *Id.*

Act evidences specific congressional concern for farmworker safety: "Undeniably, one of the major concerns that prompted OSHA's enactment in 1970 was the occupational hazard presented by the misuse of pesticides."[65]

Pursuant to this grant of authority, the Secretary of Labor enacted emergency, temporary health standards in 1973 to protect farmworkers from exposure to certain named pesticides through residue on foliage.[66] Fruit growers sued in response to these regulations, and the case was litigated in *Florida Peach Growers Association v. United States Department of Labor.*[67] The Fifth Circuit Court of Appeals took for granted[68] the Secretary's authority to establish safety standards for farmworkers, but criticized the Secretary's choice of promulgating emergency standards.[69] The majority wrote: "The reasons published by the Secretary with the standards do not themselves evidence a factual need for emergency standards. The record supports the need for some standards, but not emergency standards."[70]

One year later, the Court of Appeals for the District of Columbia handed down its decision in *Organized Migrants in Community Action v. Brennan.*[71] At issue was whether the responsibility for farmworker safety was properly within the jurisdiction of OSHA or, as the government argued, the EPA.[72] The court's ultimate decision was that the Federal Environmental Pesticide Control Act (FEPCA) placed farmworker safety within the ambit of the EPA.[73]

The first issue addressed by the court in *Organized Migrants* was the statutory authority of the EPA. Appellant farmworkers argued that FEPCA was passed to address environmental concerns, not occupational safety, and therefore gave the EPA no authority

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65. *Organized Migrants in Community Action*, 520 F.2d at 1167. *See also* E. Greenstone, *Farmworkers in Jeopardy: OSHA, EPA, and the Pesticide Hazard*, 5 ECOLOGY L.Q. 69, 72 (1976).

66. 38 Fed. Reg. 20, 715 (1973).

67. 489 F.2d 120 (5th Cir. 1974).

68. *Id.* at 124.

69. *Id.* at 129.

70. *Id.* at 130. For a critical analysis of the Fifth Circuit's holding in that case, *see* Greenstone, *supra* note 65, at 90-96.

71. 520 F.2d 1161 (D.C. Cir. 1975).

72. *Id.* at 1163.

73. *Id.*

to act on occupational safety questions.[74] The court of appeals was not persuaded by this argument. It found within the provisions of FEPCA[75] a legislative grant of power to act on those occupational issues raised by the use of agricultural toxins.[76] The majority held: "Our own analysis of the statute and its legislative history confirms EPA's ample statutory authority to issue field re-entry standards to protect farmworkers."[77]

The court then turned to analyze that section of the Occupational Safety and Health Act which provides: "[N]othing in the [Act] shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."[78] The farmworkers claimed that FEPCA did not preempt OSHA authority. The protection of agricultural laborers was, according to the appellants, one of the principal purposes of the OSHA legislation.[79] Furthermore, the appellants argued that the OSHA mandate of occupational safety was not preempted by a statute which regulates industry employees in an incidental manner.[80]

In response, the court saw nothing in either FEPCA itself or its legislative history that indicated an intent *not* to preempt OSHA.[81] While the court found that the passage of the Occupational Safety and Health Act was prompted by concerns for farmworker safety,[82] it also found a clear legislative intent to avoid duplication: "While giving the Secretary omnibus authority to regulate occupational safety and health, Congress sought to avoid the wasteful duplication that would result where another federal agency was also providing for the occupational safety of a class of workers."[83] Thus, the issue before the court was not whether FEPCA was designed primarily to protect the agricultural laborer,

74. *Id.* at 1164.

75. *See* 7 U.S.C. § 136a (1982) (all pesticides must be registered), *id.* § 136a(c)(5) (applicant must show the chemical will not have an unreasonable adverse effect on the environment), and *id.* § 136(j) ("environment" includes man).

76. *Organized Migrants in Community Action*, 520 F.2d at 1165-66.

77. *Id.* at 1165.

78. 29 U.S.C. § 651(b)(1) (1976)

79. *Organized Migrants in Community Action*, 520 F.2d at 1166.

80. *Id.*

81. *Id.* at 1167.

82. *Id.*

83. *Id.*

but rather whether that worker was "within the class which Congress sought to protect under that statute."[84] The majority held: "Since Congress intended that EPA have jurisdiction to regulate farmworker exposure to pesticides, and since the Administrator is exercising that authority, the Secretary of Labor is prohibited from acting."[85]

C. *Federal Environmental Pesticide Control Act*

The Federal Environmental Pesticide Control Act[86] was passed in 1972 to strengthen existing federal pesticide legislation.[87] The scheme of FEPCA is to mandate the registration of every agricultural poison used in the United States.[88] Registration is to be granted if the Administrator of the EPA determines, among other requirements, that: "(c) [I]t [the toxin] will perform its intended function without unreasonable adverse effects on the environment; and (d) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment."[89] Under FEPCA, "environment" is

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84. *Id.* at 1169 (quoting Fineberg Packing Co., Inc., 7 OCC. SAFETY & HEALTH REV. COMM'N 405, 406 (1974)).

85. *Id.* at 1169. One commentor has argued that incidental coverage is insufficient to preempt the OSHA mandate and, were it to be held otherwise, many major industries would fall outside the scope of OSHA. Greenstone, *supra* note 65, at 100. As to the problem of two operative agencies in the field of pesticide and employee health regulation, Greenstone writes:

> Why is OSHA needed as a backup if another agency will enforce the same regulations? . . .
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> The answer lies in the reason for which the Occupational Safety and Health Act was passed - to assure every working person safe and healthful working conditions . . . the best, and indeed only, way to guarantee such a promise is to place its enforcement within the power of the working person. The repeated emphasis in the provisions of the Occupational Safety and Health Act on enforcement mechanisms to be invoked by the workers themselves evidences an important concept of employee *self*-protection.
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> . . .The provisions of the amended Federal Insecticide, Fungicide, and Rodenticide Act protect employees only to the extent that environmental safety is a consideration and do not envision a system whereby workers can actively protect their own health and safety interests.

Id. at 103.

86. *See supra* note 18.

87. 7 U.S.C. § 135 (1970), (current version at 7 U.S.C. § 136 (1982)).

88. *Id.* § 136a(a).

89. *Id.* § 136a(c)(5).

defined within the Act to include "man,"[90] and the applicant requesting registration bears the burden of proof.[91]

The Environmental Protection Agency, in comments revealed during the course of the litigation sparked by amendments made to the FLSA in 1977,[92] advised the Department of Labor that the Secretary could not simply rely on EPA standards for setting safe pesticide exposure levels for ten and eleven year old workers.[93] The EPA warned that "the Agency cannot say what is or is not a safe standard for children simply because there is no data on which to base such an estimation and the factors involved are much more complex than for an adult."[94]

The effect of the EPA's statement is to call into question the legitimacy of pesticide registrations granted by that Agency. If data concerning the effect of the substance on children was unavailable when registration was granted, the Agency could not have justifiably concluded the material would not cause "unreasonable adverse effects on the environment"[95] since children are part of the farm environment. The violation being clear, the issue becomes whether the farmworkers have access to a remedy. There are two avenues of redress potentially available to the laborers: challenging initial registration approvals, or initiating cancellation proceedings.[96]

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90. *Id.* § 136(j).

91. While the statute does not explicitly place the burden of proof on the applicant, it does provide that:

> The Administrator shall publish guidelines specifying the kinds of information which will be required to support the registration of a pesticide and shall revise such guidelines from time to time. If thereafter he requires any additional information he shall permit sufficient time for applicants to obtain such additional information.

Id. § 136a(c)(2). The administrator is also given the power to request the data supporting the claims the applicant makes. *Id.* § 136a(c)(1)(D).

92. Washington State Farm Bureau v. Marshall, 625 F.2d 296 (9th Cir. 1980).

93. *Id.* at 303. *See also infra* text accompanying notes 110-25.

94. *Washington State Farm Bureau*, 625 F.2d at 303 n.12.

95. 7 U.S.C. § 136a(c)(5) (1982).

96. A third mechanism provided for in FEPCA, suspension, will not be discussed beyond this footnote. Suspension is a more drastic proceeding which allows the Administrator to immediately revoke registration if "necessary to prevent an imminent hazard," *id.* § 136d(c)(1). The measure is by its nature temporary and is linked to the initiation of cancellation proceedings: "No order of suspension may be issued unless the Administrator has issued or at the same time issues notice of his intention to cancel the registration." *Id.*

1. *Challenge of initial registration approvals.* FEPCA provides that an applicant refused registration may request a hearing to challenge the denial.[97] While there is a provision for interested persons to comment prior to approval of an application for registration,[98] no clause exists within the Act granting interested parties the right to administrative review of a decision to grant a registration request. In *Environmental Defense Fund v. Costle*,[99] the District of Columbia Court of Appeals was presented with challenges made to an EPA decision concerning the cancellation of a pesticide registration. The court's opinion noted: "Decisions by the Administrator to deny registration of pesticides may be challenged in an administrative hearing, but not decisions to grant registration."[100]

Precluded from seeking administrative remedy, the alternative for the farmworkers is judicial appeal. As to district court review, the pertinent section of FEPCA provides: "(a) District court review. Except as is otherwise provided in this subchapter, . . . final Agency actions not committed to Agency discretion by law are judicially reviewable in the district courts."[101] The majority in *Environmental Defense Fund* offered the following comments as to the scheme of the 1972 pesticide legislation: "The pattern seems to be . . . [that] persons seeking more stringent regulation may sue in the district court without first enduring an administrative hearing; those complaining of regulation as too strict must first exhaust their administrative remedy of a formal hearing before seeking judicial review."[102]

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97. *Id.* § 136a(c)(6).

98. *Id.* § 136a(c)(4).

99. 631 F.2d 922 (D.C. Cir. 1980).

100. *Id.* at 937.

101. 7 U.S.C. § 136n(a) (1982).

102. 631 F.2d at 937 (emphasis deleted). It is not clear whether farmworkers are entitled to judicial review by a court of appeals. Again turning to FEPCA:

> (b) Review by court of appeals. In the case of actual controversy as to the validity of any order issued by the Administrator following a public hearing, any person who will be adversely affected by such order and who has been a party to the proceedings may obtain judicial review by filling in the United States court of appeals . . .

7 U.S.C. § 136n(b) (1982). One of the problems presented here is whether the laborers should be considered "a party to the proceedings." At this time, participation is limited to the opportunity to submit comments prior to the approval of a registration. *Id.* § 136a(c)(4). Further, while this grant of a registration is in order under the Administrative Procedure Act (APA), Pub. L. No. 89-554, 80 Stat. 393 (codified as amended at 5 U.S.C. § 551 (1982)), it is arguable whether a public hearing has been held. For an analysis of some of these issues

FEPCA provides that the Administrator's approval of an application for registration of a pesticide is to be set aside if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[103] While this standard is not as rigorous as the Administrative Procedure Act's (APA) "substantial evidence" test,[104] the practice of granting registrations when the EPA itself admits there is no data showing the effect of these substances on children, would appear to constitute a violation of the law.

2. *Initiating cancellation proceedings.* Under FEPCA, cancellation proceedings are to be initiated "[i]f it appears to the Administrator that a pesticide or its labeling or other material required to be submitted does not comply with the provisions of this subchapter or, when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment. . . ."[105] While this language does not contain an explicit provision allowing for comment by interested parties, the court of appeals in *Environmental Defense Fund* held that "a party . . . may petition the EPA to issue an unconditional cancellation notice and obtain district court review of any refusal to do so."[106] The operative test by which a reviewing district court

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in the context of a preliminary cancellation proceeding, *see Environmental Defense Fund*, 631 F.2d at 922.

103. 7 U.S.C 136n (1982). Under the Administrative Procedure Act, the term "license" is defined to include registrations, 5 U.S.C. § 551 (8) (1982). The Second Circuit Court of Appeals, in World Communications, Inc. v. F.C.C., 595 F. 2d 897 (2d Cir. 1979), commented upon the treatment of licensing under the APA:

> Although licensing constitutes "adjudication", 5 U.S.C. § 551(6) and (7), this does not make an application . . . subject to an evidentiary hearing since 5 U.S.C. § 554 applies only to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing", and § 556, so far as it deals with adjudications, applies only when a hearing is required by § 554.

Id. at 901.

If a proceeding comes within the scope of §§ 554 and 556, it is subject to the more rigorous "substantial evidence" test of the APA. 5 U.S.C. § 706(2)(E) (1982). In the case of pesticide registration, however, there is no requirement that the decision be made on the record after an opportunity for an agency hearing. As a result, § 556 is not applicable and the "substantial evidence" test likewise does not come into play. Instead, the validity of the Administrator's approval of a registration request is measured by the APA's "arbitrary and capricious" standard. *Id.* § 706(2)(A).

104. *Id.* § 706(2)(E) (1982).

105. 7 U.S.C. § 136d(b) (1982).

106. 631 F.2d at 936.

is to evaluate EPA's refusal of a cancellation request is again the arbitrary and capricious standard of the APA.[107] As before, in light of the absence of data detailing the effects of pesticides and other agricultural poisons on minors, it would seem that the Administrator's decision not to initiate cancellation proceedings should be found to be violative of the law.

In theory, then, it appears as though child farmworkers are protected in their work by both the Secretary of Labor and the EPA, although the authority of OSHA has been undercut by the holding in *Organized Migrants*.[108] In practice, as the above discussion illustrates, that protection is simply nonexistent. It seems ironic that the federal government would see fit to establish regulations telling the American worker not to use the top rung of a stepladder,[109] while at the same time permitting farmworkers as young as twelve to expose themselves to substances which are linked to cancers, asthma, and other serious ailments. An analysis of recent case law in Section II further demonstrates the inadequacy of current protections afforded child farm laborers from the effects of these materials.

II. Judicial Interpretation

The FLSA was amended in 1974 to permit children as young as twelve to take their place in the agricultural workforce, again with the usual exemption allowing children younger than twelve to work on farms owned or operated by their parents.[110] Amendments made in 1977 authorize the Secretary of Labor to issue waivers allowing ten and eleven year olds to enter the farm fields and assist in the harvest of short-season crops.[111] The issuance of these waivers hinges upon a finding that "the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply."[112]

Pursuant to this legislation, the Department of Labor issued a proposed rule in April of 1978. This proposed regulation required

107. *Id.* at 935.
108. 520 F.2d at 1161.
109. 29 C.F.R. § 1910.25(d)(xii) (1982).
110. 29 U.S.C. § 213(c)(1) (Supp. IV 1980).
111. *Id.* § 213(c)(4).
112. *Id.* § 213(c)(4)(A)(iii).

an employer, for each field in which ten and eleven year old laborers might work, to identify those standards of the EPA, OSHA, or comparable authorities which established that children would not be adversely affected by pesticides used.[113] When the EPA protested that its standards had been set for adults and not children,[114] the Department of Labor amended its proposed rule in June to require that the applicant-grower either submit a statement that pesticides or associated poisons were not used on the crop to be harvested,[115] or that sufficient time had passed since the application of the toxins to make reentry safe for ten and eleven year olds.[116] The Department then commissioned an independent consultant to analyze the pesticide standards of the EPA and to suggest modifications, where necessary, so as to establish exposure levels that would comply with the 1977 amendments. Based on these studies, the Secretary issued a final rule[117] listing particular poisons which, when used as specified, would meet the waiver's standard of no "adverse effect."[118] Less than one year later, the Department issued additional rules which removed from this approved list of poisons the fungicides Captan[119] and Benomyl.[120]

Litigation arose on two fronts in response to the regulations promulgated. In the District of Columbia, the National Association of Farmworkers sought a court order enjoining the Secretary from issuing any waivers. The Association argued that the rule specifying pesticides acceptable to the waiver's standards was both substantively and procedurally inadequate.[121] In another action initiated several months later, Oregon and Washington State strawberry growers challenged the removal of Captan and Benomyl from the approved list.[122]

In the District of Columbia suit, plaintiff farmworkers sought a judgment holding that the Department of Labor's regulations reconciling the use of certain pesticides with the requirements of

113. 43 Fed. Reg. 14068, 14070 (Apr. 4, 1978) (proposed 29 C.F.R. § 575.5(d)(2)).
114. *See Washington State Farm Bureau* 625 F.2d at 299.
115. 43 Fed. Reg. 26562, 26567 (June 21, 1978) (proposed 29 C.F.R. § 575.5(d)(2)).
116. *Id.*
117. 43 Fed. Reg. 36623 (Aug. 18, 1978), *amending* 29 C.F.R. § 575.5(d).
118. 29 U.S.C. § 213(c)(4)(A)(iii) (Supp. IV 1980).
119. 44 Fed. Reg. 22059 (Apr. 13, 1979), *amending* 29 C.F.R. § 575.5(b)(2).
120. *Id.*
121. *National Ass'n of Farmworkers Org.*, 628 F.2d at 611.
122. *Washington State Farm Bureau*, 625 F.2d at 301.

the 1977 waiver legislation were in violation of that legislation, and also in violation of the notice and comment requirements of the APA. In the lower court, plaintiffs had been denied the injunction requested; the judge refused to prevent the Secretary from applying the challenged regulations.[123] The court held that the Department's standards were not violative of the "arbitrary and capricious" test of the APA.[124]

The opinion of the court of appeals is primarily an analysis of the merits of the lower court's refusal to grant the preliminary injunction.[125] The majority recognized that irreparable injury would result from such refusal:

> Here plaintiffs represent children who might work as hand harvesters if the Secretary is not enjoined from administering the waiver provision according to the challenged regulations. As a result, these children would be exposed to the pesticides and chemicals approved by the Secretary for use according to the listed "minimum entry times . . . ."
>
> The risk of harm from such exposure *pendente lite* would not be eliminated even if plaintiffs ultimately were to win on the merits.[126]

The court found that another consideration in granting an injunction, the public interest, also weighed in favor of the farmworkers:

> We must ask what is the proper balance between the economic burdens to growers denied waivers, a burden ultimately shifted to consumers, and the irreparable harm to children exposed to pesticides and chemicals through employment allowed waivers? Once again, the balance must be struck in favor of the protection of children.[127]

The court also considered whether "the petitioner made a strong showing that it is likely to prevail on the merits of its appeal."[128] The majority criticized what it perceived to be a presump-

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123. *National Ass'n of Farmworkers Org. v. Marshall*, No. 79-1044 (D.D.C. May 4, 1978).

124. *National Ass'n of Farmworkers Org.*, 628 F.2d at 612.

125. *Id.* at 613-16.

126. *Id.* at 613. The court also considered harm to other parties. It was the majority's opinion that should an injunction be granted, waivers would still issue but in far fewer numbers and only upon satisfactory conclusion of a more difficult proof process. *Id* at 614. While the court recognized that an injunction would therefore reduce the availability of the ten and eleven year old workers, *id.* at 615, it also noted the "industry obviously survived without any 10- and 11-year-old hand harvestors during the extended period preceding . . . 1977. . . ." *Id.* The court dismissed as insignificant the harm which the other party in this case, the Department of Labor, argued an injunction would impose upon it. *Id* at 615-16.

127. *Id.* at 616.

128. *Id.* at 613.

tion by the district court that the passage of the 1977 waiver legislation *required* the issuance of some waivers.[129] The court found that the proper focus of the litigation was a determination of whether the Department of Labor met the statutory requirements before issuing waivers.[130] While the majority approved of the Secretary's decision to simplify the procedure and list acceptable chemicals,[131] it found that there was no data to support the list the Secretary had prepared.[132]

The court criticized the district court's opinion that science could not now, and possibly never would be able to, provide the "requisite assurances of safety."[133] The majority noted that the consultant's studies were conducted under considerable time pressures[134] and that an employee of the consulting firm had testified "that existing methodologies, applied to this special case, would be helpful, and feasible, 'time permitting.' "[135]

Finally, the court responded to the district court's argument that since complete assurances of safety were impossible, the existing standards were sufficient.[136] The majority held that while safety could not be absolutely proven,[137] "such a proposition must not permit a court to substitute its view for the statute's explicit requirement."[138] The court accordingly concluded that an injunc-

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129. *Id.* at 617.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 618.
134. *Id.*
135. *Id.* at 619.
136. *Id.*
137. *Id.*
138. *Id.* Having weighed the substantive merit of the Association's arguments, the court of appeals then turned to consider the procedural issues. It found that the standards at issue were "clearly . . . subject to the notice and comment procedures required by the APA, 5 U.S.C. § 553." 628 F.2d at 620. In addition, the court found that with the exception of the initial regulations—those which had proposed reliance on the EPA, OSHA, and comparable authority—the Labor Department standards had not been subject to notice and comment. *Id.* at 620-21. The majority wrote:

> [G]ood cause to suspend notice and comment must be supported by more than bare need to have regulations. Especially in the context of health risks, notice and comment procedures assure the dialogue necessary to the creation of reasonable rules. The government concedes that the challenged regulations are its first attempt to set protectives standards for children employed under the agriculture waiver provision. This is exactly the kind of standard which especially needs the utmost care in its development and exposure to public and expert criticism.

tion must issue "in the interests of justice — if not plain decency. . . ."[139] It ordered that waivers under the 1977 amendments were not to be granted by virtue of the rule listing pesticides acceptable to the Secretary until that rule underwent notice and comment procedures.[140]

The growers in the Ninth Circuit litigation challenged the initial removal of the fungicides Captan and Benomyl from the list of approved poisons. The lower court read the 1977 waiver legislation as demanding only compliance with the EPA Preharvest Interval standards, standards with which all growers must comply before sending any workers, whether children or adults, into treated fields to harvest crops.[141] Finding that the strawberry growers had conformed with these EPA requirements, the court concluded that the Secretary of Labor had violated his statutory duty in not granting the waivers.[142]

The Ninth Circuit first addressed the issue of selecting safety standards. The court rejected the district court's ruling that the Secretary was bound to adopt the EPA Preharvest Interval standards.[143] The majority noted that the EPA itself had protested that its standards were appropriate for adults, but not children.[144] The court also found it significant that the independent consulting firm retained by the Department of Labor had warned that even though it had added time to the period during which children could not reenter the fields,[145] further study was necessary to assure safety.[146]

The court made additional arguments against a blanket reliance by the Department of Labor upon the EPA. The majority observed at the outset that the exceptions to the FLSA are to be narrowly construed.[147] Further, it noted the 1977 amendments re-

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Id. at 621.

139. *Id.* at 623.

140. *Id.*

141. *Washington State Farm Bureau*, 625 F.2d at 301.

142. *Id.*

143. *Id.* at 303.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 304. As its authority, the Ninth Circuit cited the decisions in Mitchell v. Kentucky Finance Co., 359 U.S. 290, 295 (1959) ("It is well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed"), and Brennan v. Keyser, 507 F.2d 472, 477 (9th Cir. 1974) ("Only those businesses clearly within both the terms and spirit of

quire the employer-applicant to submit "objective data";[148] Congress did not name the EPA as the exclusive source of such information.[149] The court reasoned that if the EPA were to be the sole source of data, and if compliance with the EPA's standards were sufficient to justify issuance of a waiver, then ten and eleven year olds could work on any farm: "It is obvious, however, that if Congress wanted only compliance with EPA standards, this existing scheme would make the waiver provision's pesticide condition superfluous, since growers would presumably have to comply with EPA standards regardless of the harvest workers' ages."[150]

The court then moved to consider the Department of Labor's actions concerning Captan and Benomyl.[151] The majority found that the evidence before the Labor Department concerning these substances was sufficient to support the decisions made.[152] Since the growers had not submitted objective data showing these two fungicides to be safe, the court concluded that the Department was reasonable in developing its own information.[153] The data gathered for the Secretary by the consulting firm indicated that Captan was carcinogenic and Benomyl mutagenic and teratogenic.[154] The majority also noted that:

> The report [of the consultants] recognized that it was scientifically reasonable to assume that children are more susceptible than adults to toxic effects and that it was particularly important to protect them against chronic or delayed effects on the reproductive system, central nervous system and other organs developing in preadolescents.[155]

The final issue before the court was procedural: Had the De-

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the exemption should be allowed to benefit from it"), *cert. denied*, 420 U.S. 1004 (1975).

148. 29 U.S.C. § 213(c)(4)(A) (Supp. IV 1980).

149. *Washington State Farm Bureau*, 625 F.2d at 304.

150. *Id.*

151. The district court, upon conclusion of a trial *de novo*, found that the Secretary had acted in a manner that was "arbitrary and capricious." *Id.* at 305. The Ninth Circuit criticized the district judge's decision to hold a trial *de novo*. *Id.* The majority found that under the APA's "arbitrary and capricious" standard, the review of an informal rulemaking proceeding is to be conducted on the basis of the evidence before the agency when the decision was made. *Id.* Further, "[t]o the extent the district court might properly have looked outside the administrative record, it failed to limit its review to background information, explanations of the record, and information needed to determine whether the Secretary considered the relevant factors and sufficiently explicated his decision." *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

partment of Labor violated the law by failing to conform with the notice and comment requirements of the APA prior to removing Captan and Benomyl from the approved list?[156] The majority ruled that there was "good cause" to stray from these procedural requirements and that the situation thus fell under the exception[157] provided in section 553(b) of the APA.[158] Given the onset of the strawberry season, the urgent need to protect children, and the necessity of informing growers, the court found that the notice and comment procedures were impractical.[159]

The holdings of these two cases illustrate the inadequacy which has characterized the federal government's response to the problem of child farmworker exposure to toxins. With the authority of OSHA swept away by the holding in *Organized Migrants*, the Department of Labor has relied unjustifiably upon the efforts and expertise of the EPA. The authority given the EPA to act on this problem is only incidental to the power given the Agency to regulate pesticides,[160] and thus far child farmworkers have been treated by the Agency only incidentally. The difficulties facing children in trying to influence the priorities of a federal agency without access to either the voting booth[161] or significant financial resources[162] are obvious. Furthermore, these children are dealing with hazards which only a mature and trained scientific mind can fully appreciate. Consequently, even if these workers had access to the resources necessary to influence the federal government, there is little reason to expect that an effort would be exerted for that

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156. *Id.* at 306.

157. *Id.* at 307.

158. 5 U.S.C. § 553(b) (1982).

159. *Washington State Farm Bureau*, 625 F.2d at 307. The court saw no inconsistency between its position and that of the District of Columbia Court of Appeals decision, wherein failure to comply with the APA mandates was held to be fatal:

> Our conclusion of good cause for bypassing notice and comment procedures is not inconsistent with the D.C. Circuit's conclusion that time for these procedures was necessary "to insure sufficiently protective regulations for issuing waivers" while the statute protected children in the interim. Adequate protection of the children was the purpose and effect of the challenged actions here while such protection was found lacking in the agency's actions approving the use of pesticides in *NAFO*.

Id.(citation omitted).

160. *See supra* notes 86-95 and accompanying text.

161. The right to vote is limited to those older than 18. U.S. CONST. amend. 26, § 1.

162. Farmworkers are typically paid minimal wages. *See* U.S. DEP'T OF COMMERCE, 1981 STATISTICAL ABSTRACT OF THE UNITED STATES 681 (1982).

purpose.

III. Potential Remedies for the Occupational Dangers Faced by Child Farm Laborers

The question now becomes whether existing legislation, if adequately enforced, would provide effective protection, and furthermore, whether existing legislation will ever be adequately enforced. Rather than attempting to reinvigorate statutes which have proven ineffective, the best solution may lie in the creation of an independent agency dedicated solely to these concerns. As with any remedy, the effectiveness of a solution to the child farmworker's dilemma will depend upon the extent to which it recognizes the unique characteristics of the group it seeks to serve. In light of the weakness characterizing the financial and political voice of farm children, it may be that any solution which depends for its effective enforcement upon an agency vested with equally serious responsibilities to other diverse constituencies should be suspect, for it runs the risk of losing farm children in the shuffle to respond to the other concerns.[163]

A. *The Potential for and Effectiveness of Rigorous Enforcement*

1. *Department of Labor.* As previously indicated, the statutory scheme currently in place would allow the Secretary of Labor to make a finding that work with agricultural poisons is "particularly hazardous."[164] That determination would justify a prohibition of employment of not only those under age sixteen,[165] but those

163. Tort law does not presently offer an adequate remedy to the plaintiff who as a child worked as an agricultural laborer and now finds him or herself stricken with, for example, cancer. For an excellent discussion of the limitations of tort doctrine in recovering for an illness the cause of which, like cancer, cannot be definitively linked to one incident, *see* Note, *Tort Actions for Cancer: Deterrence, Compensation and Environmental Carcinogenesis*, 90 YALE L.J. 840, 847-55 (1981). The author discusses some of the legal problems a plaintiff faces, including difficulties of evidence, multiple causation, and proximate causation.

The Supreme Court of New Jersey recently allowed recovery against a maufacturer for tortious failure to adequately warn of the hazards of its product, even though those hazards were *unknown* at the time of manufacture. Bashada v Johns-Mansville Prods. Corp., 90 N.J. 191, 477 A.2d 539 (1982). *See also* Nat'l L. J., Jan. 17, 1983, at 15, col. 1. If developed further, this theory might offer some relief to farmworkers, although it is not clear whether it provides an adequate solution to the problems of causation, etc., mentioned above.

164. *See supra* notes 19-61 and accompanying text.

165. 29 U.S.C. § 213(c)(2) (1976).

not yet eighteen as well.[166] There are difficulties with this approach, however, not the least of which is the already noted intransigence with which the Department of Labor has responded to the problem up to this point. In view of the intentional exclusion of the agricultural laborer from the principal protections of both the NLRA[167] and the FLSA,[168] it is possible that the Department does not consider the safety of the child farmworker to be within its purview. Whatever the rationale, it seems imprudent to entrust the responsibility for the minor farm laborer with an agency which has responded with silence[169] to explicit congressional concern over both oppressive child labor[170] and pesticide hazards.[171]

Even if the Secretary of Labor adopts a more active policy, the scope of the remedy provided would necessarily be limited by the legislation under which he or she would operate. Presumably, any regulation prohibiting the employment of children under sixteen, or for that matter under eighteen, on farms using certain named pesticides would have to meet the "arbitrary and capricious" test of the APA.[172] Given the uncertainties of current knowledge, this may represent a substantial hurdle. Furthermore, even though the Secretary of Labor has the power to declare agricultural occupations "particularly hazardous" for minors,[173] this power does not extend to situations where a child is employed by his parent or guardian.[174]

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166. *Id.* § 213(1) (2).

167. *Id.* § 151.

168. *See id.* §§ 213(a)(6), (b)(12), (c)(1) (Supp. IV 1980). The FLSA prohibits the employment of a child under sixteen in any occupation, *id.* § 203(l)(1) (1976), except those, like agricultural, specifically exempted. In the exempted industries, employment of those under sixteen is allowed unless the Secretary makes a finding of particular hazard, *id.* § 213(c) (Supp. IV 1980).

169. The only action the Secretary has taken thus far is to prohibit the employment of those under sixteen in the handling or applying of agricultural chemicals of immediate and severe toxicity. *See supra* notes 29-30 and accompanying text. This regulation ignores the hazards of indirect exposure to poisons, exposure which occurs when the laborer works among plants whose foliage is coated with pesticide residue. Furthermore, the hazards posed by persistent chemicals, those not fatal upon first contact but equally dangerous through continued exposure, are ignored.

170. *See* 29 U.S.C. § 203 (1976).

171. Congressional concern is evidenced by both the passage of FEPCA, 7 U.S.C. § 136a (1976), and the creation of OSHA. *See Organized Migrants in Community Action*, 520 F.2d at 1167.

172. 5 U.S.C. § 706(2)(A) (1982).

173. 29 U.S.C. § 213(c)(2) (1976).

174. *Id.*

2. *OSHA.* Unlike other departments and agencies, occupational safety is not merely an incidental concern for OSHA, but rather its primary purpose.[175] Its cost-benefit analysis is unique in that it places special emphasis on worker safety.[176] Its expertise in dealing with substances like carcinogens was recognized and relied upon by the District of Columbia Court of Appeals in deciding *National Association of Farmworkers Organizations.*[177] In fact, OSHA owes its existence, at least in part, to congressional concern over farmworker safety.[178]

The principal difficulty in recommending OSHA as the solution to the child farmworker's problems is the holding in *Organized Migrants.*[179] While that decision has been criticized,[180] it has not been overturned. Unless that case is reversed, or until Congress definitively indicates that existing pesticide legislation[181] is aimed at protecting the environment, and not the farmworker, reliance upon OSHA does not represent a workable remedy.

3. *EPA.* Since 1972 the EPA has operated under the mandate of FEPCA,[182] which requires the registration of all agricultural poisons used in this country.[183] Registration is not to be issued unless the Administrator finds that the poison "will perform its intended function without unreasonable adverse effects on the environment."[184] Furthermore, such unreasonable adverse effects should not result when the substance is "used in accordance with widespread and commonly recognized practice."[185]

Unlike the FLSA,[186] the remedy available under the FEPCA is not confined to children between the ages of twelve and eighteen.[187] The practice of farmers employing their own offspring at

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175. *Id.* § 651.

176. Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation,* 33 VAND. L. REV. 1281, 1316-17 (1980).

177. 628 F.2d at 614.

178. *See Organized Migrants in Community Action,* 520 F.2d at 1167.

179. *Id.* at 1161.

180. *See* Greenstone, *supra* note 65, at 69.

181. 7 U.S.C. § 136a (1982).

182. *Id.*

183. *Id.* § 136a(a).

184. *Id.* § 136a(c)(5)(C).

185. *Id.* § 136a(c)(5)(D).

186. 29 U.S.C. § 201 (1976).

187. The FLSA allows children under eighteen to work in any industry unless it is "particularly hazardous" to them. *Id.* § 203(l). Children under fourteen are allowed to work

essentially any age is so common that it was recognized in the FLSA itself.[188] Thus, no registration can be issued unless the effects of these poisons on teenagers and young children are adequately considered.

The problem with this remedy is obvious; the EPA has not been particularly receptive to farmworker concerns. It has had ten years in which to implement completely the statutory mandates of FEPCA and yet, as the cases discussed within this Comment indicate,[189] it has made little progress toward meeting that goal. Thus the efficacy of any remedy resting with the EPA is dubious.[190] There is simply too great a potential for the EPA to ignore the plight of these children in its effort to respond to other diverse and pressing concerns.

B. *Alternative Solutions*

One possible answer to the child farmworker's dilemma involves the passage of new legislation. For any new statute to provide a viable solution to this problem, it must combine elements of maximum risk avoidance with compensation for inevitable injuries. This combination is necessary because the scientific evaluation of the hazards these poisons present is both subjective and indefinite.[191] Any such scheme must also provide for workable record keeping, since the injuries these materials inflict often remain latent for months or years. Furthermore, for the scheme to have any impact at all, it must maintain independence from both the agri-

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in agriculture unless there is particular hazard. *Id.* § 213(c)(2). Twelve and thirteen year olds may be employed in agriculture with the consent of their parents, *id.* § 213 (c)(1)(B), although the bar of § 213(c)(2) is still applicable. Ten and eleven year olds, employable by virtue of the amendments made to the FLSA in 1977, are presumably less in need of protection; they may not work until the Secretary finds that "the level and type of pesticides and other chemicals used would not have an adverse effect on the health" of the workers involved. *Id.* § 213(c)(4)(iii) (Supp. IV 1980).

188. *See id.* § 203(l) (1976); *id.* § 213(c)(2).

189. *See supra* notes 121-60 and accompanying text.

190. In addition, it should be noted that workers falling within the protection of OSHA are beneficiaries of that Agency's unique cost-benefit analysis. *See*, Pierce, *supra* at note 176, at 1316-17. In contrast, farmworker safety is simply one of many factors to be considered in the registration of a pesticide; "unreasonable adverse effect" is defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136(bb) (1982).

191. *See National Ass'n of Farmworkers Org.*, 628 F.2d at 606; *see also* Parke, *supra* note 2.

cultural and pesticide industries.

The *optimum* solution would involve the creation of a new agency to register and apply the pesticides and associated chemicals currently used in this country. A manufacturer seeking to market a poison would submit that poison to the agency along with research detailing the hazards the material poses to agricultural workers of all ages.[192] The agency would in turn classify the substance as prescription or nonprescription,[193] with a heavy presumption that a substance should be classified as prescription. Nonprescription materials would be available as are over-the-counter drugs currently. If a farmworker suffered an injury which was suspected to have been caused by exposure to a nonprescription poison, the usual tort[194] remedies would be available.

Prescription pesticides would be applied at the farmer's request by trained agency employees. The agency would record the material used, the farm where it was used, and the date of use. The agency would also receive copies of the W-2 forms for all the farm's employees at the end of each year. If at some later date an employee developed an illness, he or she would contact the agency and provide proof of that ailment. The agency would then check its records to determine where the employee had worked and to what materials he or she was exposed. If the employee developed lung cancer, for example, and was exposed to materials suspected of causing lung cancer, the employee would be entitled to an award. The award would be based partially upon the individual's life expectancy,[195] but would also include compensation for pain

192. This data would be evaluated according to the same standards any respected scientific journal uses before it agrees to publish material. For a discussion of how scientific publications evaluate articles submitted and of critcisms which the method has engendered, see M. O'CONNOR, THE SCIENTIST AS EDITOR 28-40 (1979).

193. This classification would be made according to statistics indicating the risk the substances pose. For example, if a group of people, when exposed to a certain material as farmworkers would be, contracted twenty-five percent more cancers or suffered thirty percent more miscarriages, the material would be considered a prescriptive toxin. The percentage figure chosen would be affected by, among other things, the adequacy of the data supporting registration. If an applicant submitted data of poor quality, registration, and thus the right to market the product, would be denied. On the other hand, exhaustive research detailing the hazards of a product would weigh in favor of a higher percentage figure, and thus a greater likelihood of classification as non-prescription.

194. For an analysis of litigation involving exposure to toxins, *see generally* Birnbaum, *Toxic Substances: Problems in Litigation*, 170 PRAC. L. INST. 1 (1981); Birnbaum, *Toxic Substance Litigation*, 151 PRAC. L. INST. 1 (1980).

195. If a thirty year old were suffering from a terminal cancer, he or she would be

and suffering.

The cost of this award would be divided among manufacturers according to their share of the market in the years during which the employee was exposed. If the employee handled two materials suspected of causing lung cancer, for instance a fungicide and a pesticide, the award would be apportioned accordingly. Manufacturers would be entitled to reduce the award upon a showing that the employee acted in such a way as to increase his or her chances of developing the ailment[196] or that the farmer employing the worker was negligent.[197] In the latter case, the farmer would share responsibility with the manufacturer.[198]

CONCLUSION

The promise of a safe work environment made in 1970 has yet to be realized by the child farmworker. While in theory protected by the Department of Labor, OSHA, and the EPA, the minor agricultural worker in fact has received no recognition of the special hazards he or she faces when exposed to agricultural toxins: The EPA continues to violate the law by registering poisons even

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entitled to a greater award than a fifty-five year old with the same ailment. If a particular toxin caused a birth defect, the award would be influenced by the cost of care and therapy.

196. Following the example of a farmworker contracting lung cancer, manufacturers would be entitled to reduce the award by showing the employee smoked.

197. Negligence could be shown, for example, where the farmer ordered his employees back into the field before the recommended waiting period had passed.

198. If new information revealed that a nonprescription pesticide would more properly have been classified as prescription, the employee could pursue the usual tort remedies. In the alternative, if the farm laborer could prove employment on a farm that, for example, grew potatoes, and the laborer was suffering from an ailment that a nonprescription pesticide typically used on potatoes was now recognized as or suspected of causing, the laborer would be entitled to an award. Again, the amount would be apportioned among the manufacturers according to their share of the market for that particular substance. If the classification error was made in good faith, the award would be the same as that given had the poison initially been classified as prescription. If the error was made in bad faith, substantial punitive damages would be paid to the worker. Failure to reveal new information concerning the hazards posed by a currently registered material would be considered bad faith.

As part of the cost of concluding its pesticide manufacturing operations, a manufacturer would be presented with two options: If it continued to exist as a corporation, it could agree to accept liability, though no longer an active member of the market, for the latent illnesses its products prove to cause over the next twenty-five years. In the alternative, if the corporation so chose, or if the organization was dissolving, it would be required to purchase an insurance policy to handle its potential liability over the next twenty-five years. In the latter case, if the corporation were dissolving because of bankruptcy, payment of the insurance costs would be a claim of the highest priority.

though it has no data detailing the effects of these materials on children.[199] The authority of OSHA to act has been undercut by the holding in *Organized Migrants*.[200] While the Secretary of Labor has taken steps to limit the extent to which children handle toxins that pose an immediate threat of death or serious bodily harm,[201] the consequences of frequent exposure to chemicals less immediately harmful but ultimately as hazardous have been ignored.

The children who work on American farms lack the means to influence effectively the federal bureaucracy.[202] Nonetheless, if the laws passed for their protection were more rigorously enforced, at least limited relief would be offered. The Secretary of Labor could prohibit the employment of children under sixteen,[203] or for that matter children under eighteen,[204] in agricultural occupations that use pesticides or similar materials. This would offer no protection, however, to children employed on their parents' farms. The EPA could include child farmworkers in the cost-benefit analysis FEPCA directs be performed before the issuance of any registration for an agricultural toxin,[205] but this would relegate children to a position of being one of many incidental concerns the EPA weighs before granting an application for registration.[206] This is far different from the protection given workers falling within the ambit of OSHA.[207] OSHA represents an attractive solution, but no longer has authority to act on the subject.[208]

The creation of a new agency designed to serve as the farmworkers' advocate on these matters presently represents the best solution. Given the characteristics of the victims herein involved, a passive response, one depending upon active victim participation and involvement to be effective, is no response at all.[209] Moreover, any such remedy must recognize the complications

199. *See supra* notes 92-94 and accompanying text.
200. 520 F.2d at 1161.
201. 29 C.F.R. § 570.71(a)(9) (1982).
202. *See* notes 161-62 and accompanying text.
203. *See* 29 U.S.C. § 213(c)(2) (1976).
204. *See id.* § 203(l)(2).
205. 7 U.S.C. § 136a(a) (1982).
206. *See supra* note 190.
207. Greenstone, *supra* note 65, at 103.
208. *Organized Migrants in Community Action*, 520 F.2d at 1169.
209. *See supra* notes 160-62 and accompanying text.

caused by the long latency period of many of the illnesses linked to toxin exposure[210] and the uncertainties surrounding current knowledge of toxicology.[211]

More effective enforcement of existing legislation or the creation of a new agency may provide an answer to the problem of child farmworker exposure to toxins, but in a very real sense they represent a response to a symptom and not to the disease. The simpler and more logical solution to the farmworkers' dilemma lies in a rethinking of our attitudes toward the use of these toxins. Americans annually apply approximately one billion pounds of pesticides, herbicides, and like material to their land, livestock, and often to themselves.[212] The ultimate effect of many of these materials is unknown, and the residue of poisons applied in one growing season will often be present in the environment for many years thereafter. Ironically, at the same time these materials are used to eliminate the insects and diseases which reduce crop yields, the federal government maintains a program for paying farmers *not* to cultivate land so as to lessen harvests and maintain reasonable prices for farm goods.[213] In effect, the agriculture industry uses toxins to artificially *increase* the crop yields which the government has puposefully and artificially *decreased.*

The exposure of child farmworkers to lethal toxins represents an unnecessary tragedy caused by this incongruous thinking. Americans must accordingly reevaluate their attitudes toward pesticide use, but in the interim the need for more effective enforcement of present laws or the creation of a new agency to oversee the use of toxins will remain. The immediate challenge is to protect farm children; the long-term goal must be to develop a comprehensive program for the use of toxins in agriculture.

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210. *See* Note, *supra* note 163, at 851.

211. *See supra* note 2.

212. McEwen, *Pesticide Residues and Agricultural Workers—An Overview,* in PESTICIDE MANAGEMENT AND INSECTICIDE RESISTANCE 37 (1977).

213. Agricultural Adjustment Act of 1938, ch. 30, 52 Stat. 31 (codified as amended at 7 U.S.C. § 1281 (1982).